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Apparent judicial bias – a hard argument to win?

The England and Wales Court of Appeal has declined to find apparent bias despite an extraordinary case of judicial indiscretion.

The decision confirms the approach adopted by the New Zealand Supreme Court in *Saxmere*[1] but also reflects a reluctance to uphold allegations of apparent judicial bias.

The case

Harb v HRH Prince Abdul Aziz Bin Fahd Bin Abdul Aziz [2016] EWCA Civ 556 concerned an appeal against a judgment enforcing a contract between Prince Abdul Aziz bin Fahd, a member of the Saudi royal family, and Mrs Harb. The Prince appealed on several grounds, including the appearance of judicial bias by the Judge, Peter Smith J.

The allegation centred on a letter which Peter Smith J sent to Blackstone Chambers advising that he would no longer support it because he did not wish "to be associated with Chambers that have people like Pannick in it".

Smith had taken objection to an article by a member of the Chambers, Lord Pannick QC, which criticised Peter Smith J's "inexcusably bullying manner and threats" in an earlier unrelated case,[2] in which the Judge recused himself after becoming involved in a personal dispute with the defendant, British Airways, over his own lost luggage.

The Prince's Counsel, also Blackstone members, argued that the apparent hostility toward Lord Pannick in particular and the Chambers in general would infect Peter Smith J's attitude toward the Prince himself.

The Court of Appeal rejected the claim, but remitted the matter to the High Court for re-trial on other grounds.[3]

The fair-minded observer

The Court's approach was in substance the same as that adopted by the New Zealand Supreme Court in *Saxmere*.[4] The test in both cases was, broadly, "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".[5]

The Court found that, while Peter Smith J may have been biased (temporarily at least) against all members of Blackstone Chambers, the evidence was not sufficient to conclude that there was "a real possibility that this bias would affect the judge's determination of the issues in a case in which a party was represented by a member of Blackstone Chambers".[6]

Indeed, the Court concluded that it was "unrealistic"[7] to assume that Peter Smith J was actuated by bias against the Prince because, prior to the article's publication, he had:

- expressed a clear provisional view of the case, and
- drafted the bulk of his judgment.

The fair-minded observer must not only be intelligent and dispassionate, but possessed of "all the relevant circumstances", including those that are not publicly available.[8]

Nonetheless, the Court was unsparing in its criticism of Peter Smith J's conduct:

> *"It is difficult to believe that any judge, still less a High Court Judge, could have [written the letter]. It was a shocking and, we regret to say, disgraceful letter to write. It shows a deeply worrying and fundamental lack of understanding of the proper role of a judge".*[9]

Chapman Tripp comments

The distinction between the appearance of bias or hostility toward counsel and bias toward the parties to the proceeding appears to be a fine one.

The Court commented that judges often become irritated by advocates but are expected to be true to their judicial oaths and not allow these feelings to affect their determination of the issue. An informed and fair-minded observer is taken to know this.

Even so, there will surely be circumstances in which a fair-minded observer might consider there to be a real possibility that a judge's attitude toward counsel may undermine his or her ability to be impartial. The judicial oath will not be a complete answer in all cases.

This was, of course, the case in *Saxmere*, where the Supreme Court held that a fair-minded observer could reasonably consider the judge to have been beholden to counsel, albeit in a case involving a potential financial interest, in such a way as might unconsciously affect the impartiality of the judge's mind.

The difference between the two cases is that the Court in *Saxmere* found apparent bias to exist and the Court in *Prince Abdul* did not. One can sense the reluctance in the Court of Appeal to find apparent bias on facts which could surely have justified the finding.

It may be true that the Judge had already indicated a view and drafted most of his decision prior to the Pannick article. But the Judge's letter was still written and sent before the decision was delivered. The general public would be entitled to discern an element of generosity in the Court of Appeal's assessment.

Footnote

1. *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* (No2) [2009] NZSC 122, 1 NZLR 76 (SC). See also *Deliu v National Standards Committee* [2015] NZHC 67; G v Psychologists Board HC Wellington CIV-2007-485-2558, 8 December 2009; *Muir v Judicial Conduct Commissioner* [2013] NZHC 989.
2. *Emerald Supplies Ltd v British Airways* [2015] EWHC 2201 (Ch).
3. The Court held that the Judge had failed to examine evidence and the arguments with the care that a proper resolution of the issues demanded, at [48].
4. *Saxmere* (at [4]): Judge disqualified if "a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide." Citing the High Court of Australia in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.
5. At [54].
6. At [74].
7. At [75].
8. Harb at [72].
9. At [68].

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